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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1075

LeBEOUF BROS. TOWING CO., INC. and T/B CTCO-186-20 and and T/B CTCO-185, their tackle, apparel, furniture, etc.,
Petitioners

Versus

UNITED STATES OF AMERICA,
Respondent

MOTION FOR AUTHORITY TO FILE BRIEF AS AMICI CURIAE AND AMICI CURIAE BRIEF IN SUPPORT OF APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence K. Benson, John C. Christian and Joseph E. LeBlanc, Jr. of Milling, Benson, Woodward, Hillyer & Pierson; Richard B. Sadler, Jr. of Provosty & Sadler; Clyde R. Brown of Shotwell, Brown & Sperry; George J. Bailey of Bailey & Hollier; Lawrence E. Donohoe, Jr. of Davidson, Meaux, Onebane & Donohoe; John T. Guyton of Hargrove, Guyton, Ramey and Barlow, and Robert Roberts, III of Blanchard, Walker, O'Quin & Roberts, AMICI CURIAE

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Petitioners

versus

UNITED STATES OF AMERICA
Respondents

MOTION FOR PERMISSION TO FILE BRIEF AS AMICI CURIAE

MAY IT PLEASE THE COURT:

The Amici Curiae whose names are set forth at the conclusion of this Motion, in accordance with Rule 42 of this Court, move that they be permitted to file this brief as Amici Curiae in support of the Application of LeBEOUF BROS. TOWING CO., INC., and T/B CTCO-186-20 and T/B CTCO-185, their tackle, apparel, furniture, etc., Petitioners, for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on August 16, 1976, reported at 537 F.2d 149, rehearing denied October 12, 1976 [Appendices A, B, C, and D of Petitioners' Application].

Amici Curiae, although not appearing on behalf of any of the parties in these cases, represent numerous clients throughout the oil and gas industry, and throughout the

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water transportation industry, who along with all others similarly situated within those industries, are vitally interested in the outcome of these cases and will be tremendously effected by any decision rendered herein. Petitioners' Application further presents this Court with serious questions concerning the administration of the "oil spill" provisions of Public Law 92-500, the Federal Water Pollution Control Act Amendments of 1972, and, in particular, with what continued effect is to be given to past decisions of this Court bearing upon the issues raised herein, but which were disregarded by the Fifth Circuit below.

Because of the need for clarification of this Court's past decisions, and because of the far reaching and pervasive impact which any decision rendered herein will have on the oil and gas and water transportation industries, Amici Curiae respectfully request that this brief be accepted and considered by the Court in support of Petitioners' Application for review. [redacted]

Respectfully submitted:

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BY: _____
JOHN C. CHRISTIAN

CERTIFICATE

I, JOHN C. CHRISTIAN, one of the counsel for Amici Curiae, being a member of the bar of the Supreme Court of the United States, do hereby certify that on the 24th day of March, 1977, I served three copies of the above Motion and accompanying Brief of Amici Curiae upon the Counsel for Petitioners and Respondents herein, by depositing copies thereof in the United States Mail, postage prepaid and properly addressed, to Charles Lugenbuhl and Thomas J. Grace, 1800 First National Bank of Commerce Building, New Orleans, Louisiana, 70113, Counsel for Petitioners, and to Carla H. Hills, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D.C. 20530; to Gerald Gallinghouse, United States Attorney, United States Department of Justice, 500 Camp Street, New Orleans, Louisiana; to Anthony J. P. Farris, United States Attorney, 1200 Federal Building, Houstin, Texas, 77002; to Leonard Schaitman and Michael H. Stein, Attorneys, Appellate Section, Civil Division, Department of Justice, Washington, D.C. 20530, Attorneys for Respondents.

_____
JOHN C. CHRISTIAN

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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LeBEOUF BROS. TOWING CO., INC. and T/B CTCO-186-20 and T/B CTCO-185, their tackle, apparel, furniture, etc.,
Petitioners

Versus

UNITED STATES OF AMERICA,
Respondents

BRIEF OF AMICI CURIAE IN SUPPORT OF APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I.
INTEREST OF AMICI CURIAE

The interests of Amici Curiae in these proceedings are set forth in their attached Motion for authority to file this brief as Amici Curiae.

II.
ARGUMENT

In each of these cases Petitioners notified the United States Coast Guard of oil spills from their respective vessels

and, based upon that notification,[1] were assessed a "civil" penalty, under § 311(b) (6) of the FWPCA, 33 USCA §1321 (b)(6). Petitioners claim that the penalties are actually "criminal" in nature and are barred by § 311(b) (5) of the FWPCA, which provides "immunity" against use of the notification by Petitioners "in any criminal case."[2] The Fifth Circuit Court of Appeals below held that because Petitioners, as corporations, do not enjoy a *constitutional* right of immunity from self-incrimination, there was no need to inquire into the nature of the penalty as "criminal" or "civil". The labeling of the penalty as "civil", the Fifth Circuit said, was sufficient to deprive Petitioners of the *statutory* immunity provided by the Act.

A.

This decision, Amici Curiae submit, is patently in error, and urgently requires review because:

(1) The Fifth Circuit disregarded past decisions of this Court which hold that the nature of a statutory penalty must be determined as a matter of *statutory construction*, and not

1. Notification of the spills was required, under criminal penalty, by §311(b) (5) of the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"). Petitioners have pointed out, at Page 7, Note 1 of their Application, that these cases actually arose prior to passage of the 1972 Amendments, but those amendments were irrelevant to the provisions of the statutes involved here.

2. The provision for "use immunity" is co-extensive with the Fifth Amendment privilege against self-incrimination. *Kastigar v. United States*, 406 U.S. 441, 32 L.ed. 2d 212 (1972).

simply constitutional right.[3]

(2) The Fifth Circuit disregarded Congress' express grant of statutory immunity *more extensive* than that constitutionally required.[4]

(3) The Fifth Circuit disregarded past decisions of this Court which hold that where rights are granted by Congress or by an administrative agency which are more generous than those constitutionally required, they cannot be disregarded at will, but must be "scrupulously observed".[5]

B

Amici Curiae also urge that the refusal of the Fifth Cir-

3. *Helvering v. Mitchell*, 303 U.S. 319, 399, 82 L.ed. 917 (1938); *United States Ex Rel Marcus v. Hess*, 317 U.S. 537 , 549, 87 L.ed. 443, 452 (1943); *Trop v. Dulles*, 356 U.S. 86, 95, 2 L.ed. 2d 630, 639 (1958); *United States v. Constantine*, 296 U.S. 287, 80 L.ed. 233 (1935); *United States v. LaFranca*, 282 U.S. 568, 75 L.ed 551 (1931); and *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 34 L.ed. 2d 438, 443 (1972).

4. In this the Fifth Circuit ignored its own prior decision in *United States v. Mobil Oil Corporation*, 464 F.2d 1124 (5th Cir., 1972), which recognized that a "corporation" was included within the definition of "person", In § 311(a) (7) of the Act, (33 USCA §1321(a) (7)), which was followed by the Sixth Circuit in *United States v. Republic Steel Corporation*, 491 F.2d 315 (6th Cir., 1974).

5. *Vitarelli v. Septon*, 359 U.S. 535, 539, 546, 3 L.ed. 2d 1012, 1016-1017, 1021 (1959); *Service v. Dulles*, 354 U.S. 363, 380, 1 L. ed. 2d 1403, 1414 (1957). See also *Pacific Molasses Company v. FTC*, 356 F.2d 386, 389-390 (5th Cir 1966).

cuit to make a finding as to the nature of the penalties imposed against Petitioners must be set aside because:

(1) The Fifth Circuit recognized that the penalty furthers an essentially *deterrent function*, but disregarded past decisions of this Court which hold that "deterrence" is the hallmark of a "criminal" penalty.[6]

(2) The Fifth Circuit disregarded past decisions of this Court which hold that even if the penalties are not "criminal" for *all* purposes, they are nevertheless "criminal" for the limited purposes of immunity against self-incrimination.[7]

(3) The Fifth Circuit's finding of a "civil" purpose in the use of the penalty to defray clean-up costs connected with discharges from "unknown sources" and "unidentified polluters" is plainly unconstitutional, for it violates due process of law to confiscate the money or property of one person for the wholly independent act or omission of another.[8]

6. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 9 L.ed. 2d 644, 661 (1963). See also *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 220 F.Supp. 621, 630 (N.D. Ill., 1963) aff'd 376 U.S. 782, 12 L.ed. 2d 83 (1964).

7. *Boyd v. United States*, 116 U.S. 616, 634, 29 L.ed. 746, 752 (1874); *Lees v. United States*, 150 U.S. 476, 480, 37 L.ed. 1150, 1151 (1893); *United States v. Regan*, 232 U.S. 37, 50, 58 L.ed. 494, 499 (1914); *United States v. U.S. Coin and Currency*, 401 U.S. 715, 718, 28 L.ed 2d 434, 437 (1971); and *Helvering v. Mitchell*, 303 U.S. 391, 400, 82 L.ed.917, 922 Note 3 (1938).

C.

Amici Curiae further emphasize herein that the specific immunity provisions of §311(b) (5) of the Act distinguish these cases from the "civil penalty" cases presently pending before this Court and arising under the Occupational Safety and Health Act of 1970,[9] and those cases should have no bearing upon any decision rendered herein.

III. CONCLUSION

For all of the foregoing reasons, the Amici Curiae hereinafter set forth respectfully request that the Application of Petitioners for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on August 16, 1976, be granted.

8. *Brennan v. OSHRC*, 511 F.2d 1139, 1145 (9th Cir., 1975); *State v. A/S Ney Kristianborg*, 84 F.Supp. 755, 780 (D. Md., 1949); 16 Am. Jur. 2d Constitutional Law, § 380, p. 717.

9. *Atlas Roofing Co., Inc. v. OSHRC*, No. 75-746, and *Frank Irey, Jr., Inc. v. OSHRC*, No. 75-748, upon the docket of this Court.

New Orleans, Louisiana, this 24th day of March, 1977.

Respectfully submitted:

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